No. 75-1505

In the Supreme Court of the United States

OCTOBER TERM, 1975

A. W. THOMPSON, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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CITATIONS

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-7a) is reported at 525 F. 2d 870. The decision and order of the National Labor Relations Board (Pet. App. 9a-38a) are reported at 216 NLRB No. 134.

JURISDICTION

The judgment of the court of appeals (Pet. App. 7a-8a) was entered on January 30, 1976, and a petition for rehearing was denied on February 26, 1976.

The petition for a writ of certiorari was filed on April 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that petitioner lacked a reasonable basis for believing that the union certified as representative of its employees no longer enjoyed majority support and thus that petitioner violated the National Labor Relations Act by withdrawing recognition from the union.

STATEMENT

1. Petitioner is one of approximately 60 oil well drilling contractors operating in the Permian Basin of Texas and New Mexico (Pet. App. 1a). In 1966, the Board certified Local 826, International Union of Operating Engineers, AFL–CIO ("the Union") as the bargaining representative for petitioner's drilling employees pursuant to its special election formula for the Permian Basin drilling industry (Pet. App. 15a).[1]

[1] Permian Basin drilling contractors characteristically undertake jobs of relatively short duration. After the completion of a job the contractor either immediately moves his drilling rig to a new site or takes it out of service until a new job is available. In either event, when the rig is again placed in operation it may be stationed many miles from its former location and may contain a new crew hired from the general area of the new site. Thus, frequent relocation of operations and high turnover of employees is a feature of this industry. See *Hondo Drilling Co.*, 164 NLRB 416, 417, enforced, *National Labor Relations Board* v. *Hondo Drilling Co.*, 428 F. 2d 943 (C.A. 5). In order to protect the voting rights of the employees of the Permian Basin drilling contractors, the Board, in *Hondo Drilling*, fashioned a formula of voter eligibility which took the industry's special pattern of employment into account (164 NLRB at 417). Pursuant to this formula, the Board conducted a series of elections and thereafter certified the Union as the collective bargaining representative for the employees of 13 industry contractors, including petitioner. The issue raised in the instant petition has previously been presented to the Court by two of the other contractors (see n. 3, *infra*).

On November 16, 1967, following the Union's election victory and certification, the parties entered into an agreement which had an expiration date of August 2, 1968 (Pet. App. 15a). Prior to expiration of that agreement, contract talks were resumed and by July 1, 1969, the parties reached agreement on all terms of a new contract. Petitioner, however, refused to execute the contract and began a course of conduct which was "calculated to discourage adherence to the union cause," including making coercive statements and soliciting employee repudiation of the Union. *National Labor Relations Board* v. *A. W. Thompson, Inc.*, 449 F. 2d 1333, 1336 (C.A. 5), certiorari denied, 405 U.S. 1065. In enforcing the Board's order requiring petitioner to bargain in good faith, the court of appeals found that petitioner had violated its bargaining obligations under the National Labor Relations Act by failing to meet with the Union at reasonable times, refusing to sign an agreement already reached, and unilaterally granting a 20-cent an hour wage increase without prior notice to or consulation with the Union. Finally, the court rejected

petitioner's claimed "good faith" doubt of the Union's majority status and held that its withdrawal of recognition from the Union had been unlawful. 449 F. 2d at 1334–1336.

Contract talks were resumed following the court of appeals' decision and on May 29, 1973, the parties entered into a seven-month "working agreement," to remain in effect until December 31, 1973 (Pet. App. 15a; GCX 3).[2] The parties did not communicate again until October 22, 1973, when the Union served timely notice of its intention to reopen negotiations and requested petitioner to supply the dates it would be available for bargaining (Pet. App. 15a–16a; GCX 5, p. 18). When petitioner did not respond to this request, the Union sent followup letters of December 3, 20, and 26, 1973, to the same effect, the last stressing the "urgent need for negotiations to begin" because "our current working agreement terminates on December 31, 1973" (Pet. App. 15a–16a; GCX 7, GCX 10–11; Tr. 122–123). By letter dated December 28, 1973, petitioner's counsel, Brooks Harman, broke petitioner's two-month silence by withdrawing recognition a second time, stating that he had been instructed to inform the Union that petitioner "declines to negotiate a new or renewal contract" because it had a

[2] "R." references are to the record material contained in "Volume I Pleadings"; "Tr." refers to the transcript of testimony before the Board; "GCX" and "JX" refer to the General Counsel's exhibits and joint exhibits introduced at the hearing.

"good faith" doubt of the Union's majority status (Pet. App. 16a; GCX 12).[3]

On January 1, 1974, petitioner informed its employees by written notice that the collective bargaining agreement had expired and that the Union had been told that it was "no longer recognize[d]" as the exclusive bargaining representative of petitioner's employees. It coupled this news with the announcement of wage increases for unit employees ranging between 20 and 40 cents an hour (Pet. App. 16a; GCX 13 and GCX 3–4). The Union was not notified or consulted before petitioner granted these increases, nor was it notified prior to April 11, 1974, when petitioner announced a second round of wage increases for unit employees ranging between 40 and 50 cents an hour (Pet. App. 16a–17a, 29a; JX 2; Tr. 195–196; R. 225–226).

2. The Board, adopting the decision of the Administrative Law Judge, held that petitioner had

[3] Petitioner thereupon became the fourth Permian Basin drilling contractor represented by the same attorney to withdraw recognition from the Union on that basis; the others are the Leatherwood, Brahaney, and Hondo drilling companies. As here, the Board found the actions of those employers to be unlawful, and the court of appeals sustained the Board's findings. See *National Labor Relations Board* v. *Leatherwood Drilling Company* and *National Labor Relations Board* v. *Brahaney Drilling Company*, 513 F. 2d 270 (C.A. 5), enforcing 209 NLRB 618 and 209 NLRB 624, and *National Labor Relations Board* v. *Hondo Drilling Company*, 525 F. 2d 864 (C.A. 5). Certiorari was denied in *Leatherwood* and *Brahaney* on December 8, 1975 (No. 75–419); the employer's petition for a writ of certiorari in *Hondo* (No. 75–1506) is currently pending.

violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 61 Stat. 140, 29 U.S.C. 158(a)(5) and (1), by withdrawing recognition from and refusing to bargain with the Union (Pet. App. 22a–29a). In so holding, the Board rejected petitioner's contention (Pet. 19–20) that it had a "good faith" doubt of the Union's continuing majority status.

Specifically, the Board rejected petitioner's reliance on the high rate of employee turnover characteristic of this industry, concluding (as it had previously ruled in *Leatherwood,* 209 NLRB at 622, and *Brahaney,* 209 NLRB at 627) that the ordinary presumption that replacements will continue to support a union to the same extent as their predecessors (see, *e.g., National Labor Relations Board* v. *Little Rock Downtowner, Inc.,* 414 F. 2d 1084, 1091 (C.A. 8); *National Labor Relations Board* v. *John S. Swift Co.,* 302 F. 2d 342, 345 (C.A. 7)) is equally applicable to the Permian Basin drilling industry (Pet. App. 26a–27a).[4] The Board also rejected petitioner's reliance on a five-month hiatus in communications from the Union (Pet. App. 26a, 20a–21a).[5]

Regarding petitioner's reliance on "unfavorable employee comments" about the Union, the Board noted

[4] Petitioner's annual turnover rate of 400 percent was less than half the turnover rate in either *Leatherwood* or *Hondo.* See Pet. App. 4a & n. 3. See also 209 NLRB at 627 (*Brahaney*).

[5] In *Leatherwood* and *Brahaney*, the Board held that communications hiatuses of even greater duration were characteristic of bargaining in this industry and did not reflect adversely on the Union's majority status. 209 NLRB at 620–621; 209 NLRB at 625–626.

that this claim was supported not by testimony from petitioner's employees but by the "rather vague" and "[un]convincing" testimony of petitioner's president and his administrative assistant, "neither [of whom] was able to provide names or details concerning alleged employee expressions of dissatisfaction with the Union" (Pet. App. 21a–22a, 27a). That evidence, the Board concluded, merely showed that " 'several' employees out of a unit of up to 200 employees may have casually expressed at one time or another dissatisfaction with, or indifference to, the Union" (Pet. App. 27a).

In addition, the Board found that petitioner was unable to show that the Union's failure to process grievances or appoint rigs stewards, although authorized by the contract, had in "any way reflected adversely upon its responsibilities as bargaining representative." Indeed, the fact that no grievances had been filed during the contract term "obviate[d] the necessity of appointing rigs stewards," who primarily would have been involved in processing such complaints (Pet. App. 25a, 18a–19a).

Finally, the Board concluded that, contrary to petitioner's contention, the bulletin boards at the drilling rigs had been used by the Union on an occasional basis[6] and that, in any event, the contract did not require their use, but merely afforded a privilege

[6] The record shows that the Union did not make extensive use of the bulletin boards because it had determined, for a variety of reasons, that the best way to maintain contact with its members was by direct mailings (Pet. App. 25a–26a; Tr. 123–131, 133, 160, 219).

which the Union could choose to exercise, or, as here, to forego (Pet. App. 25a–26a, 19a–20a).[7]

The Board therefore ordered petitioner, *inter alia,* to bargain with the Union upon request (Pet. App. 35a–37a, 9a–11a). The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a–7a), stating that it had "no difficulty" finding substantial evidentiary support for the Board's conclusion that petitioner had failed to sustain its burden of proving a good faith doubt as to the Union's majority status (Pet. App. 3a).[8]

ARGUMENT

National Labor Relations Board certification of a union as the bargaining representative of unit employees creates a rebuttable presumption of continuing majority status after the expiration of the certification

[7] The Board also observed (Pet. App. 28a):

"Apart from its failure to meet the requirements for establishing a reasonable basis for a good faith doubt of the Union's continuing majority, the fact that [petitioner], although asserting a good faith doubt throughout the entire fall of 1973, failed to apprise the Union of its position in this regard until December 28, 1973, just 2 days before the Working Agreement expired, coupled with its earlier refusal to meet, to supply the Union with requested employee data, or to in any way justify its having ignored such requests, in itself casts a cloud on the sincerity with which the [petitioner] advances its good faith argument."

[8] Previously, on September 23, 1975, the court had granted the Board's motion for temporary relief under Section 10(e) of the Act, 29 U.S.C. 160(e), restraining petitioner from making unilateral changes in mandatory subjects of bargaining pending its decision.

year. *Brooks* v. *National Labor Relations Board,* 348 U.S. 96, 104. Thus, petitioner was privileged to withdraw recognition from the Union after the certification year only if it had a reasonable basis for a good faith doubt of the Union's continuing majority status. *Retired Persons Pharmacy* v. *National Labor Relations Board,* 519 F. 2d 486, 489 (C.A. 2); *National Labor Relations Board* v. *Gulfmont Hotel Co.,* 362 F. 2d 588, 589 (C.A. 5). These well settled principles are not in question here.[9] The sole issue raised by the petition is whether substantial evidence supports the Board's findings that petitioner did not have such a good faith doubt. That issue, which rests on the particular factual circumstances of this case, does not warrant further review.

Petitioner's contention that the Board abused its discretion by failing to look at the "totality of all the circumstances" (Pet. 16–17, 21, 24) is belied by the Board's careful analysis of the evidence (see Pet. App. 25a–28a). This is the identical argument unsuccessfully urged upon this Court by the Petitioners in

[9] There is no merit to petitioner's contention (Pet. 7, 8–9, 11–12) that the Board required it to prove that the Union had actually lost its majority status, and not merely that it had a reasonably based belief of such loss. The Board stated (Pet. App. 24a) that "the employer need establish only that it had a reasonable basis for doubting the union's majority at the time of its refusal to bargain." Petitioner's objections (Pet. 11–12) relate to the settled requirement that a good faith doubt "must be shown by objective facts and not merely by an assertion thereof or proof of the employer's subjective frame of mind" (Pet. App. 24a).

Leatherwood and *Brahaney;* besides challenging what was settled in those cases (*i.e.,* that turnover and communications lapses are characteristic of the Permian Basin oil industry and do not signify union weakness), petitioner has shown nothing that would indicate a diminution in employee support for the Union and would thus justify a contrary result here.[10]

Nor is there merit to petitioner's claim (Pet. 22–24) that the ruling below conflicts with decisions in other cases. As we explained in our Brief in Opposition in *Brahaney Drilling Company, et al.* v. *National Labor Relations Board, supra,* p. 10, n. 10, each of the cases on which petitioner relies is factually distinguishable from the circumstances here.[11]

[10] Indeed, as was the case in *Leatherwood*, petitioner's president also "had no thought about whether his new employees supported the Union any less strongly than the old" (Tr. 96).

[11] We are sending a copy of our brief in opposition in *Brahaney* to counsel for petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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